

Patchwork Law Reform: Your Idea Is Good in Practice, but It Won't Work in Theory

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Abstract

This article elaborates a conception of law reform that is pluralistic, interactional, non-formulaic, attentive to implicit normativity and not exclusively instrumental. It argues that law reform practice is always informed by theory. Where theory is inadequate, law reform practice is likely to result in a sub-optimal patchwork. An appropriate theory of law reform will have the following attributes. First, it will have a respect for human agency. This respect is made manifest in law reform on dimensions of form, substance, purpose, authority, mode, regime, sites, and system. Second, an adequate practice of law reform must attend to structural features of legal institutions, and in particular the systematic and symbolic character of explicit reform to legislative texts. It must also account for the dimensions of interaction between different normative institutions, and various types of implicit law reform activity that does not appear in changes to legislative texts. Finally, it must be grounded in a sensitivity to socio-cultural context. It is argued in conclusion that an adequate theory and practice of law reform will be less reform than re-substance, and a transformation in ideas of law will engender a transubstantiation of its practice.

Keywords

Law reform

PATCHWORK LAW REFORM: YOUR IDEA IS GOOD IN PRACTICE, BUT IT WON'T WORK IN THEORY ©

RODERICK A. MACDONALD* & HOI KONG**

This article elaborates a conception of law reform that is pluralistic, interactional, non-formulaic, attentive to implicit normativity and not exclusively instrumental. It argues that law reform practice is always informed by theory. Where theory is inadequate, law reform practice is likely to result in a sub-optimal patchwork. An appropriate theory of law reform will have the following attributes. First, it will have a respect for human agency. This respect is made manifest in law reform on dimensions of form, substance, purpose, authority, mode, regime, sites, and system. Second, an adequate practice of law reform must attend to structural features of legal institutions, and in particular the systematic and symbolic character of explicit reform to legislative texts. It must also account for the dimensions of interaction between different normative institutions, and various types of implicit law reform activity that does not appear in changes to legislative texts. Finally, it must be grounded in a sensitivity to socio-cultural context. It is argued in conclusion that an adequate theory and practice of law reform will be less reform than re-substance, and a transformation in ideas of law will engender a transubstantiation of its practice.

Cet article décrit en détail la conception d'une réforme de la loi à la fois pluraliste, interactive, non exprimée en formules, soucieuse de normativité implicite et non exclusivement instrumentale. Il soutient que la mise en application pratique d'une réforme de la loi est toujours guidée par une théorie. Quand la théorie n'est pas adéquate, l'application pratique de la réforme de la loi aboutira probablement à un ensemble disparate d'un niveau insuffisant. Une théorie appropriée d'une réforme de la loi doit avoir les caractéristiques ci-après. Tout d'abord, elle doit faire preuve de respect pour la condition humaine. Ce respect se manifeste dans la réforme de la loi par des dimensions de forme, de substance, d'objectif, d'autorité, de mode, de régime, de sites et de système. Ensuite, une application pratique adéquate d'une réforme de la loi doit veiller aux particularités structurelles des institutions légales, surtout au caractère systématique et symbolique d'une réforme explicite des textes législatifs. Elle doit tenir compte également de l'étendue de l'interaction entre les diverses institutions normatives et des différents types de l'activité implicite de la réforme de la loi qui n'apparaît pas dans les changements des textes

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The present text originates in two articles written by the co-authors in 2002. The first is a paper presented on 15 March 2002 at the annual meeting of the Quebec Comparative Law Association in Montreal under the title "La méthode de modification du Code civil depuis son adoption." The other was submitted in August 2002 as a term article at the Faculty of Law of McGill University under the title "Codal Reform as Law Reform." The article also incorporates ideas set out in recent work undertaken for the UNCITRAL Secured Transactions Working Group as well as themes developed in an article produced for the Department of Justice in connection with the Harmonization Project, or the Program of Research Contracts on Canadian Bijuralism, online: <<http://canada.justice.gc.ca/en/bijurilex/index.html>>. The authors are grateful to Professors Isa Bakker and Lorne Sossin, designated commentators on this paper at the Harry Arthurs symposium. Robert Leckey and Adrienne Gibson kindly read the penultimate version and made several suggestions for improving the flow of the text.

législatifs. Enfin, une réforme doit être fondée sur l'influence du contenu socio-culturel. L'article conclut en indiquant qu'une théorie et une application pratique adéquates d'une réforme de la loi consisteront moins en une réforme qu'en une nouvelle substance, et qu'une transformation de la loi en idées engendrera une transsubstantiation de sa mise en application.

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I. INTRODUCTION: PERILS OF PATCHWORK LAW REFORM

It is hardly a surprise that there are as many conceptions of law reform as there are conceptions of law multiplied by conceptions of reform.¹ All these could be plotted in a revealing matrix: of form and substance, of organic growth and sharp disjunctures, of explicit and

¹ While the burden of this article is taxonomic, there are, nonetheless, a number of types of law reform that we do not directly envision or discuss. Most exclusions relate to the legislative product of the State. Routine or housekeeping amendments to taxation, local government, regulatory, food and drugs, environmental, and other "science-driven" statutes are some of the excluded types. Constitutional amendments are another. A third set of exclusions include changes to everyday government operations by way of legislation adjusting the power and jurisdiction of administrative agencies and implementing the expenditure side of budgets. This article focuses on law that speaks directly to legal subjects—whether generated by the State or some other legal order, and whether the rules may be characterized as duty-imposing or power-conferring.

implicit, and of means and ends.² But it is not our purpose here to engage in taxonomies for the sake of taxonomies.³ Like definitions, taxonomies are only representations of possible or contingent truths. Nonetheless, they tell us much about the organization of knowledge, and about the commitments and presuppositions upon which that organization of knowledge rests. They enable us to foreground certain characteristics, qualities, and relationships, and to occlude others. In law particularly, they imply and legitimate a normal case by typecasting the other as alternative and marginal.⁴

Consider, for example, how the commonplace distinction between theory and practice is deployed in legal argument. Being practical means knowing and teaching how to navigate one's way through the "real" world, where "real" means the world seen in the way that everybody else in law (and especially, constituted legal elites) sees, or is believed to see it. Being theoretical, by contrast, typically means

² On these points see Robert A. Samek, *The Meta Phenomenon* (New York: Philosophical Library, 1985). In their application to law reform see Roderick A. Macdonald, "Access to Justice and Law Reform" (1990) 10 Windsor Y.B. Access Just. 287; Roderick A. Macdonald, "Recommissioning Law Reform" (1997) 35 Alta. L. Rev. 831 [Macdonald, "Recommissioning"].

³ We embrace the understanding of legal taxonomy that is expressed in Geoffrey Samuels, "Can Gaius really be compared to Darwin?" (2000) 49 I.C.L.Q. 297 and Stephen A. Smith, "Justifying the Law of Unjust Enrichment" (2000-2001) 79 Tex. L. Rev. 2177 at 2178-80. This accounts for our use of multiple taxonomic devices: sets of dualisms (theory versus practice, instrumentalism versus symbolism, state-centrism versus legal pluralism, and commands versus facilitative baselines); a four-cell typology of textual reforms (organized according to legislative objectives and techniques); nested categories of law reform (explicit, non-explicit, and tacit); and an open-ended set (or laundry-list) of lessons about law reform. In addition to their function of assisting us to discover or invent data, frame relationships, and test our normative commitments, these different taxonomic devices also enable critics to seize more easily upon (and thereby help us understand) the gaps in our analysis, our unconscious assumptions, and the politics of our claims.

⁴ Not surprisingly, Harry Arthurs has put this insight into legal taxonomies better than anyone. Recall his pithy query in defence of legal pluralism: "who is to carry the burden of the qualifying (uncomfortable) adjective?" This question requires us to confront both who gets to define the "normal," and the basis upon which they do so. It also speaks to larger issues about Arthurs' view of law and law reform that we develop here. Today, the message of law, of teaching and scholarship, is most often conceived in instrumental terms. What is it good for? Arthurs also sees another, more fundamental aspect to the endeavour. Law is not just about what can be done with it—about how to recognize and contest power so as to make the world a better place. Law is about human aspiration—about the goals we set for ourselves and the standards of virtue against which we judge our conduct. In this article, we trace these Arthursian themes as follows: the scholar (1) as critic of a contextualized, instrumental reasoning in law; (2) as critic of a legal profession unable to see beyond official mandates and prerogatives; (3) as unabashed legal pluralist; (4) as seeking the creative possibilities of the inevitable, especially in less visible regulatory forms; and (5) as skeptic about the New Economy, rights discourse, and U.S. legal imperialism.

thinking and teaching that there may be various other “realities,” and ways to see them, and that these other perspectives might help in our navigation of the “real” world that everyone else sees.

This way of stating the distinction has superficial appeal. Presumably, to be successful, one has to deal with the others. This means engaging in an “other” created and imagined world. Additionally, being an engaged citizen or lawyer means that one should aspire to change it for the better. Yet, if ameliorative efforts are to bear fruit, the engaged cannot be merely content in dreaming up a different legal map and compass to re-orient those who would follow. To be sure, one must speak truth to power; but speaking is not enough. Convictions must be effectively acted upon.⁵ This is the lesson we take from the Eleventh Thesis on Feuerbach.⁶ How precisely, then, ought we to pursue this world-changing law reform endeavour?

For many, the answer is clear: in all cases of conflict, prioritize practice over theory. From this perspective, a failure to attend to the existing cartography of law—the cartography of legal elites—is best expressed in the remonstrance: “that is a good idea in theory, but it won’t work in practice.” Interpreted generously, the object of this critique of theory is that ideas that look good in the untested realm of one’s brain may prove unworkable when they are put into practice. Obviously, this caution offers good counsel. Whatever we imagine—no matter how comprehensive our investigation, how considered our reflection, and how plausible our conclusions—we constantly bump up against unexpected constraints on our liberty to act effectively in the world. But the scope of this commonplace counsel is limited. It only informs us that ideas and practices should be evaluated against one another.⁷ It does not rule out fundamental reflection about existing legal

⁵ For this reason we take our distance from practices of theorizing that restrain themselves to “pure criticism” or “consciousness raising” without more, and that are indifferent to the felt exigencies of social life. For critiques of this tendency in critical legal scholarship see, in the American context, Michael C. Dorf, “After Bureaucracy” (2004) 71 U. Chicago L. Rev. 1245; and in the Canadian context, Richard F. Devlin, “The Law and Politics of ‘Might’: An Internal Critique of Hutch’s Hopeful Hunch” (2000) 38 Osgoode Hall L.J. 545.

⁶ Karl Marx, “Theses on Feuerbach,” in Karl Marx & Friedrich Engels, *The German Ideology Parts I & III* (New York: International, 1947) at 194. This passage is often quoted: “The philosophers have only *interpreted* the world, the point is to *change* it.” [Emphasis in original].

⁷ In North America, the interdependence of theory and practice is powerfully reflected in pragmatist thinking. See Thomas Dewey, *Democracy and Education: An Introduction to the Philosophy of Education* (New York: New York Free Press, 1916), c. 11; Charles Sanders Peirce,

cartographies; nor does it foreclose the possibility that these cartographies may change as different ways of seeing and doing things are brought to light, and the circle of legal cartographers is expanded.⁸

Hence the theme of this article: the necessary role of theory in the effective practice of law reform. We argue that just as there can be many good ideas that will not work in practice, there are an equally large number of practices that appear to work in application but do not work in theory. What does this mean? To say that a law reform initiative does not work in theory means that despite its apparent instrumental efficacy in achieving a desired outcome, it creates unintended incoherence elsewhere within a normative frame: its narrow instrumental efficacy is compromised or even trumped by its overall systemic effectivity.⁹ Much contemporary legislative law reform is like this. It has the character of patchwork—a direct response to a particular set of issues (typically by creating an exception to an existing regulatory regime) that merely defers to moments of political or professional consensus.¹⁰

“How To Make Ideas Clear” reprinted in Louis Menand, ed., *Pragmatism* (New York: Vintage, 1997) 26. Some hold pragmatism to be central to legal thinking in the United States. See Robert S. Summers, *Instrumentalism and American Legal Theory* (Ithaca: Cornell University Press, 1982). Recently, it has emerged as a dominant theme in the New Governance and Experimentalist literature. For an example of Experimentalist writing on this theme and for this interpretation of pragmatism, see Michael C. Dorf & Charles F. Sabel, “A Constitution of Democratic Experimentalism” (1998) 98 Colum. L. Rev. 267 at 284-87; Orly Lobel, “The Renew Deal: The Fall of Regulation and the Rise of Governance in Contemporary Legal Thought” (2004) 89 Minn. L. Rev. 342.

⁸ Moreover, the privileging of practice over theory in this manner implicitly carries the implausible message that practices in the world are simply unmediated by human reflection. By contrast, we hold that being practical and engaging in a practice are not just unconsidered or wholly determined (non-purposive) activities; the very idea of practice is a complex theoretical construction.

⁹ On the meaning and the importance of the distinction between efficacy (how well a rule achieves its intended purpose) and effectivity (the total consequences—both desired and undesired, foreseen and unforeseen—of a rule), see Guy Rocher, “L’effectivité du droit” in Andrée Lajoie, *et al.*, eds., *Théories et émergence du droit: pluralisme, surdétermination et effectivité* (Montreal: Themis, 1995) 133. In signalling the need for normative integration, we do not imply that law reform must necessarily be incremental and conservative. Rather, the claim is that if first-order reform risks producing incoherent first- and second-order consequences, the law reformer is obliged to continue the reform endeavour by reframing second-order principles as well as the first-order objectives. For an illustration and critique of a recent law reform initiative that fails to do so see Hoi Kong, “Changing Codes and Changing Constitutions” (2005) 46 C. de D. 629.

¹⁰ One of the best treatments of the law reform process, using specific case studies to test the efficacy and effectivity of different initiatives over the past forty years is William A. Bogart,

This article views contemporary legal reform through the lenses of narrativity, implicit law, and interactional legal pluralism¹¹ and argues against disingenuous cartographies of law and naively instrumentalist conceptions of law reform. Part II aims at the *theory of practice* in law reform. We describe and assess the intellectual underpinnings of law reform when the endeavour is understood as imagining that legal subjects, in their myriad social locations, both constitute and are constituted by law.¹² Part III focuses on the *practice of theory* in law reform. Here, we first use the flow of amendments to the *Civil Code of Quebec* (CCQ) to illustrate and critique dominant law reform practices for their failure to attend to the structural features of particular instruments and institutions¹³ and for their presupposition that legislative amendments should be privileged as a mode of reform. These examples demonstrate why it is important to consider the semiotic implications of altering codal text and point to conditions under which legislatures and others can alter the substance of legislation without touching its text. We then turn to the continuing saga of commercial law reform in the former socialist republics of central Europe to illustrate how a failure to attend to the particularities of economic and socio-

Consequences: The Impact of Law and its Complexity (Toronto: University of Toronto Press, 2002).

¹¹ The practice of law reform effectively engages citizens as lawmakers only when legislatures acknowledge and adjust to the institutions, instruments, and socio-political context within which they live the law. For a conception of law similar to the one advanced here, see Shauna Van Praagh, "Identity's Importance: Reflections of—and on—Diversity" (2001) 80 Can. Bar Rev. 605. For the normative significance of narrative, see Martha Nussbaum, "Narrative Emotions: Beckett's Genealogy of Love" (1988) 98 Ethics 225. On the idea that legal subjects are also law-creating agents, see Robert M. Cover, "The Supreme Court—1982 term: Foreword Nomos and Narrative" (1983) 97 Harv. L. Rev. 4.

¹² In the standard account of law as described in Part II(A), a legal subject is imagined to be simply the passive target of legal regulation within a given state legal system. However, here we broaden and recast the expression "legal subject" in two ways. First, we use it to refer to the legal subject within *any* normative system. Moreover, we see the legal subject not merely as an object of legal regulation, but also as an agent. The law-creating possibilities of legal subjects outlined in Part II(B) are discussed in Martha-Marie Kleinhans & Roderick A. Macdonald, "What is a *Critical Legal Pluralism*?" (1997) 12:2 C.J.L.S. 25.

¹³ Sometimes legislatures display a cavalier attitude towards the normative demands of system and are indifferent to the demands of a given instrument or institution. This concern about the proper deployment of institutions is evident in much legal process writing. See notably Henry M. Hart & Albert M. Sacks, *The Legal Process: Basic Problems in the Making and Application of Law* (New York: Foundation Press, 1994). Recently, Lester M. Salamon, ed., *The Tools of Government: A Guide to the New Governance* (Oxford: Oxford University Press, 2002) has presented a particularly nuanced treatment of the instrument choice question.

political context inevitably leads to unsuccessful law reform through legal transplants.¹⁴ In neither Quebec nor central Europe is legislative fiat, unmoored from an understanding of background institutional, instrumental, and social conditions, sufficient to produce truly effective reform.

II. THE THEORY OF PRACTICE IN LAW REFORM

A theory of practice in law reform necessarily presupposes some conception of law. We consider two perspectives on law, each of which shapes a different understanding of law reform. In the first perspective, law is primarily instrumental, an explicit form of state authority, and aimed at controlling human behaviour.¹⁵ This is the dominant scholarly position of today. The other perspective is the position we adopt in this essay. We see law as primarily symbolic, as focused on the implicit forms of law, as arising in myriad everyday relationships, and as aimed at facilitating human interaction.

The big idea underwriting the dominant view of law reform is that law constitutes a tool of government: an instrument exclusive to the state. This higher-order political perspective does not necessarily carry over into the everyday politics of the left or right, but at times it does. For example, many see law as the weapon by which democratically elected legislatures can contest, control, and counter social and economic power. As Harry Arthurs himself is wont to observe, power is a central feature of the contemporary world, and those who wield it often do so egregiously: life may no longer be so short, but it is for many

¹⁴ Sometimes legislatures may manifest over-confidence in the instrumental impact of their actions, forgetting that a legal system only functions effectively as a normative enterprise when it acknowledges deeply-ingrained beliefs and behaviours. For a typology of legal transplants, cognizant of the importance of sensitivity to local context, see Jonathan M. Miller, "A Typology of Legal Transplants: Using Sociology, Legal History, and Argentine Examples to Explain the Transplant Process" (2003) 51 Am. J. Comp. L. 839. See also the several articles on legal transplants in David Nelken & Johannes Feest, eds., *Adapting Legal Cultures* (Oxford: Hart, 2001).

¹⁵ We specifically avoid the term "analytical positivist" here because it is under-inclusive of the view we advance. Standard legal realist analysis also forms part of the dominant viewpoint as does most social-scientific legal pluralism. For an account that develops the point, see Roderick A. Macdonald, "Here, There and Everywhere: Theorizing Jacques Vanderlinden; Theorizing Legal Pluralism" in *Mélanges Jacques Vanderlinden* (Montreal: Yvon Blais) [forthcoming in 2006].

still nasty and brutish.¹⁶ Although we accept the importance of legal practices that resist power, we believe that the dominant view of law, even when it embraces a progressive agenda, is unsatisfying because it assumes too little about the capacities and instruments of the state as an *institution*¹⁷ and too much about the reach of state *law*.¹⁸ In the face of this theoretical under- and over-reaching, we argue for a pluralistic and interactive theory of law and social life.¹⁹

A. *The Law that Reforms*

The instrumentalist view has two central features: the first speaking to what is presumed to be the essence of human beings, and the second to the purpose and nature of legal rules. From these features flows a particular image of law reform's purposes, processes, agencies, and products, and of the relationship between theory and practice in law reform. Those who see legal rules as explicit commands or orders conceive law as a mechanism of social control aimed at regulating and correcting pre-existing behaviours and inclinations. The legal anthropology of this account considers human beings as primarily inclined to act in ways that are destructive toward their relationships with one another. Law reform in this sense means correction: correcting legal rules that may not quite be right, so that they can better serve the goal of correcting the comportment of delinquent legal subjects.

On what ground are these conceptions of human fallibility and redemptive law reform erected? At the bottom, the claim is that law is a fundamentally coercive mechanism of social control, and the obedience

¹⁶ Power and its uses and misuses have been a deep concern throughout Arthurs' career. See "Woe Unto You, Judges: or How Reading Frankfurter and Greene, *The Labor Injunction*, Ruined Me as a Labour Lawyer and Made Me as an Academic" (2002) 29 J.L. & Soc'y. 657.

¹⁷ This does not commit us to conceding the state's weakness in the face of competing centres of power. There are many tools of action besides law that the state can deploy to effect its purposes. To see legislation as the state's only weapon to correct political and economic injustice offers too parsimonious a view of its capacities.

¹⁸ The dominant conception of law reform ignores or discounts the means by which legal subjects can shape normative responses to the power imbalances within their own communities. For development of a pluralist interactional view that expands the reach of legal analysis beyond the state and opens the possibility of social and economic power being effectively contested where it arises, see *infra* note 35 and accompanying text.

¹⁹ For the instability of power relations, when viewed through a pluralist lens, see W. Michael Reisman, *Law in Brief Encounters* (New Haven: Yale University Press, 1999) at 107-08.

of legal subjects results from the state's ability to back its prescriptions with force. Theorists have recently added the requirement that a legal rule must speak to the agency of officials. To be law, a rule must be understood as such from the internal point of view of the legislator and judge;²⁰ but legal rules need not correspond to the internal point of view of those who are subjects. The legitimacy of legal rules ultimately rests on the state's claimed monopoly on coercion.

It is no coincidence that a central question remains for the pre-eminent practitioner of this dominant tradition in legal theory: why should legal rules be obeyed?²¹ Such a question makes sense only if one imagines the relationship between the giver and recipient of legal rules to be one of subservience, where the rule-giver wields authority over the rule-recipient. Moreover, this central question assumes that the legal subject should obey the legal command as given. In the manner of the Ten Commandments, it assumes that the natural inclination of the legal subject is to err. Therefore correction, or at least guidance towards socially worthy behaviour, is required. The situations where this assumption best plays out are, of course, the criminal law and regulatory contexts. This modelling of legal rules, if extended to all spheres of legal endeavour, inevitably produces a modeling of legal subjects. The legal subject is constructed as fundamentally recalcitrant. Yet there is always the hope that the legal subject will mend his or her ways, or will be awed into compliance by the fear of punishment.

The instrumental account of law also leads to a particular view of the agencies, processes, and outputs of law reform. The paragon is a permanent, independent, official agency whose role is to supervise the development of the law, and to make legislative proposals that would seek to rectify inconsistencies flowing from the ad hoc and sporadic outputs of the litigation, and occasionally the legislative, process.²² The flaws in a legal system, the gaps and irrationalities in doctrine, the

²⁰ H.L.A. Hart, *The Concept of Law*, 2d ed. (Oxford: Clarendon Press, 1994). For this shift in positivist theory see, K.I. Winston, "Three Models for the Study of Law" in William J. Witteveen & Wibren van der Burg eds., *Rediscovering Fuller* (Amsterdam: Amsterdam University Press, 1999) 51 at 52-67.

²¹ See e.g. Joseph Raz, *The Authority of Law: Articles on Law and Morality* (Oxford: Clarendon Press, 1979).

²² William H. Hurlburt, *Law Reform Commissions in the United Kingdom, Australia and Canada* (Edmonton: Juriliber, 1986) at 15-50; Peter North, "Law Reform: Problems and Pitfalls" (1999) 33 U.B.C. L. Rev. 37.

distances between the content of the law and the expectations of legal professionals, are to be overcome by enacting reforming statutes. In brief, instrumental law reform is imagined to be an ideologically-neutral technology superintended by legal professionals.²³

This theoretical model typecasts law reform as an eminently "practical" exercise that should not expressly concern itself with theory. This is especially true with "big theory" about the forms and purposes of law and the political assumptions of any given regulatory regime. Moreover, any attempt to engage with people about law reform and to plumb their attitudes about law is disparaged as a waste of taxpayer dollars. When applied to an official agency of law reform, the only relevant question must be: "is the commission successful?" That question can be answered affirmatively or negatively by counting the number of commission proposals that have been introduced as legislation.²⁴

Similar stories about the means and ends of law reform are told by authors with avowedly progressive political agendas.²⁵ The only difference lies in the goals to be pursued. For progressives, inappropriate behaviour is to be corrected through legislation that alleviates political, economic, and social injustice by redressing inequalities and proscribing discrimination that flows from various markers of difference. Here again, human beings are conceived as objects of regulation and law reform remains a question of correction. Admittedly, the questions asked and the populace to be addressed in answering them is broader than in the standard model of law reform. The goal is not just to consider technical questions of primary interest to the legal profession, but substantive matters that bear on the lives of people who fall outside of the legal mainstream—the socially disadvantaged and the politically marginalized. Nonetheless, in its

²³ William H. Hurlburt, "The Origins and Nature of Law Reform Commissions in the Canadian Provinces: A Reply to 'Recommissioning Law Reform' by Professor R.A. Macdonald" (1997) 35 Alta. L. Rev. 880 at 885.

²⁴ William H. Hurlburt, "A Case for the Reinstatement of the Manitoba Law Reform Commission" (1997) Man. L.J. 215. Notice the formalist character of the inquiry. Hurlburt's questions are not "do the proposals actually work?" or "if they work, to whose benefit?" or even "how would we try to find out if these proposals are working?"

²⁵ See J.N. Lyon, "Law Reform Needs Reform" (1974) 12 Osgoode Hall L.J. 421; Audrey Macklin, "Law Reform Error: Retry or Abort?" (1993) 16 Dal. L.J. 395. Not all progressive law reformers take an instrumentalist view, as the work of Robert Samek, "A Case for Social Law Reform" (1977) 55 Can. Bar Rev. 409 attests.

instrumental focus on state law and therefore, in its privileging of legal professionals in the implementation if not formulation of law reform measures, even the broader approach to the constituencies of law reform typically taken by progressives remains within the theoretical ambit of the standard model of law.²⁶

B. *The Law that Forms*

The instrumental approach to law reform may be dominant, but it is not the only one operative today. Law does not just aim to correct recalcitrance; nor need it be conceived as essentially an adjunct to the coercive power of the state, directed to or compelling particular outcomes. Law can also be thought of as providing the framework within which people seek to shape their relations with one another.²⁷ To imagine law as facilitating self-directed action by legal subjects, and legal subjects as something other than recidivists is to imagine that the loci of legitimacy is neither exclusively found in claims state officials make about the law they administer, nor exclusively found in the law of the state itself.²⁸

²⁶ The desire for non-professional participation in the law reform process, motivated by this progressive impulse, was expressed by several participants in a series of consultations about law reform initiated by the federal Department of Justice in the mid-1990s. See e.g. Federal Law Reform Conference, Atlantic Institute of Criminology, *Final Report* (1993) [unpublished, archived at the Law Commission of Canada]; see also K.E. Ashbury & R.G. Hann, *Prairie Consultation on Law Reform* (1993) [unpublished, archived at the Law Commission of Canada]; Canada, Law Reform Division, *Creating a New Law Reform Commission of Canada: A Consultation Paper* (Ottawa: Law Commission of Canada, 1994); Canadian Institute for the Administration of Justice, *Creating a New Law Reform Commission: The Judicial Perspective*, (1994) [unpublished, archived at the Law Commission of Canada]; K. Ashbury & R.G. Hann, *Department of Justice Law Reform Consultation: University of Toronto* (1994) [unpublished, archived at the Law Commission of Canada]; and Canada, Law Reform Division, *Proposal for the Creation of the Law Commission of Canada*, (Ottawa: Law Commission of Canada, 1995).

²⁷ Lon L. Fuller, *The Morality of Law* (New Haven: Yale University Press, 1969) at 207, 210. We most obviously locate this understanding of normativity in Arthurs' work, in his affirmation of non-Diceyan rule-making and substantive, in addition to Austinian, formal authority in administrative law. See Harry W. Arthurs, "Jonah and the Whale: The Appearance and Reappearance of Administrative Law" (1980) 30 U.T.L.J. 225 at 233 ff.

²⁸ This contrast between top-down and horizontally-generated authority can also be seen in some jurisdictions' approach to the regulation of language. In Quebec and France, officials of the *Office de la langue française* and the *Académie Française* respectively, believe they can control a language's rules and contents by fiat. But citizens in those jurisdictions know that the validity of linguistic norms is tested against their aspirations and their practices. For a leading work in descriptive linguistics that affirmed this latter approach to language, and critiqued earlier prescriptive work in the field which tracked the approach of the *Office* and *Académie*, see F. de

From this viewpoint, the legitimacy of legal rules is no longer seen to be dependent upon the institutional pedigree of their maker, or ultimately on the coercive power of those who claim to enforce law. Legitimacy lies in two other epistemic spaces: belief and behaviour. A legal rule is legitimate only to the extent that it can capture people's imaginations and make them believe it is worth engaging with and participating in the normative framework proposed. Moreover, the legitimacy of a legal rule depends on a minimum functionality common to all rules: its capacity to effectively capture, shape, and refract parties' perceptions of problems. In brief, a legal rule ceases to be a command and instead becomes a hypothesis of action and interaction.²⁹

To conceive legal rules in this way is to presume a distinctive relationship between so-called rule-givers and rule-recipients—one that requires neither a hierarchy of official institutions nor force. The absence of pedigree and coercion shifts the focus of analysis to all the social locations where people frame their relationships with one another using rules, including the interaction between rule-giver and rule-recipient.³⁰ The internal point of view of law necessary for a legal rule to be legitimate is radically democratized.³¹ It is expanded beyond the circle of those who make the rules of the state to all those who participate in the formation of all rules, or virtually everybody.

The legal anthropology of this account of rules is that legal subjects are not reduced to the status of objects in the regulatory panopticon.³² They are instead understood as agents creating both their ties with the state and with one another. Moreover, in their interactions with the state, people are not presumed merely to obey the state's dictates. Instead, they are understood to negotiate state normativity in

Saussure, *Cours de linguistique générale*, édition critique, ed. by T. de Mauro (Paris: Payot, 1982). A more detailed elaboration of this horizontally-generated idea of law is presented in Kleinhans & Macdonald, *supra* note 12. Arthurs has also developed this theme in *Without the Law* (Toronto: University of Toronto Press, 1985).

²⁹ The point is discussed further in Roderick A. Macdonald, "Triangulating Social Law Reform" in Ysolde Gendreau, ed., *Mapping Society Through Law* (Montreal: Thémis, 1993) 117.

³⁰ This insight into the norm-creating possibilities of alternative sites, has been eloquently expressed in J. Carbonnier, *Le droit flexible: pour une sociologie du droit sans rigueur* (Paris: L.G.D.J. 2001).

³¹ The analytic lacunae created by limiting the internal point of view to state officials are identified and critiqued in Winston, *supra* note 20 at 65-68.

³² Michel Foucault, *Discipline and Punish* (New York: Vintage Books, 1995) 195-228.

the same way that they negotiate the norms that they create among themselves.³³ People will occasionally obey, they will more often alter, and sometimes they will even simply ignore the hypotheses of action proposed by the State.³⁴ This picture of an interactional and pluralist legal order and the place of legal subjects within it should not be confused with a pastoral Eden. Hierarchy, privilege, and inequalities of power persist; incidents of exploitation and domination abound. However, the source of the remedies for these pathologies does not presumptively lie with the state or with a coercive, disciplining law.³⁵

If the model for the instrumentalist account of legal rules can be found in the Benthamite statute, the archetype for the pluralist account may be the common law judgment as explicated by Gerald Postema, whose discussion provides an allegory for the constitutive role of all legal subjects in law reform.³⁶ Memory is the central concept in Postema's understanding of the common law rule, and its significance is more than structural. It is moral. This moral quality ties Postema's

³³ See, for illustrations, Roderick A. Macdonald, "The Swiss Army Knife of Governance" in Pearl Eliadis *et al.*, eds., *Designing Government: From Instruments to Governance* (Montreal: McGill-Queens University Press, 2005) 203; Roderick A. Macdonald, "The Governance of Human Agency Through Federal Security Interests" in Howard Knopf, ed., *Security Interests in Intellectual Property* (Toronto: Carswell, 2003) 577. No longer is the threat of state-sanctioned coercion the motivating factor in rule-following, and no longer is the state presumed to be the site where legal rules *should* be generated. There is no *a priori* reason to believe that the state has a better grasp of what is at stake in a particular situation requiring regulation than does the legal subject.

³⁴ Sally Falk Moore, *Law as Process* (London: Routledge, 1978) at 54-81. These processes of negotiation occur even in the criminal law context. See Dan M. Kahan, "Social Influence, Social Meaning and Deterrence" (1997) 83 Va. L. Rev. 349.

³⁵ For instance, the community economic development movement—W.H. Simon, *The Community Economic Development Movement* (Durham: Duke University Press, 2001)—and the community policing movement—Archon Fung, "Deliberative Democracy, Chicago-Style: Grass Roots Governance in Policing and Public Education" in Archon Fung & Erik O. Wright, *Deepening Democracy: Institutional Innovations in Empowered Participatory Governance* (New York: Verso, 2003) 111—evidence informal means of combating inequality.

³⁶ "On the Moral Presence of Our Past" (1991) 36 McGill L.J. 1154. Postema's understanding of the doctrine of *stare decisis* gives a clear portrait of the role of the legal subject in pluralist theory, although two caveats should immediately be pointed out. First, while Postema talks of the common law judge, his thesis applies in all situations of institutional adjudication, whether or not connected to the state. Second, the thesis also applies to ordinary human interaction over time and not just adjudication: it could be interaction between officials (see Lon L. Fuller, "Freedom as a Problem of Allocating Choice" (1968) 112 Proc. Am. Phil. Ass'n 105) or between legal subjects (see Lon L. Fuller, "Human Interaction and the Law" (1969) 1 Am. J. Juris. 3). For this contrast between the logic and form of statutes and common law judgments, see Gerald J. Postema, *Bentham and the Common Law Tradition* (Oxford: Clarendon Press, 1989) at 14-19.

account to a tradition of ethical theory that has been called "narrative ethics."³⁷

Ethical and legal reasoning in the narrative account is not an exclusively rational and discrete choice. Rather, it involves an aesthetic element, as the narrative theorist fits particular choices within an overarching story about his or her moral life. The aesthetic values of symmetry and resemblance determine whether a particular fact situation is sufficiently similar to another to justify the discovery, application, and justification of a rule.³⁸ Like the common law judge who constructs, through the use of the categories of doctrine, a story about the sources and future of that doctrine, the narrating subject making a legal decision constructs a theory of relationship and interaction.³⁹ The narrative understanding is simultaneously a projection backward and forward in time. Ultimately, any given judicial formulation of a common law rule, any legal act, and any moral decision is simply a moment in a conversation across time.

The primary question for the theorist who imagines legal rules to be individuated commands is: "why should legal rules be obeyed?" The fundamental query for those who ground law in interaction and imagine legal rules to be moments in ongoing conversations about the character of the relationships that are in issue is: Does this conversation make sense?

³⁷ For a standard use of this term, see Stanley Hauerwas & L. Gregory Jones, eds., *Why Narrative?: Readings in Narrative Theology* (Grand Rapids, Mich.: W.B. Eerdmans, 1989). Notable contributions to this tradition include Alasdair MacIntyre, *After Virtue* (Notre Dame: University of Notre Dame, 1984), and Martha Nussbaum, *The Fragility of Goodness: Luck and Ethics in Greek Tragedy and Philosophy* (Cambridge: Cambridge University Press, 1986).

³⁸ This genre of ethical theory has been applied to jurisprudence by Lawrence Solum, "Virtue Jurisprudence: An Aretaic Theory of Law," Working paper, delivered at the Columbia Law School Legal Theory Workshop, online: Columbia University Law School <http://www.law.columbia.edu/center_program/legal_theory/papers/fall04?exclusive=filemgr.download&file_id=95159&rtcontentdisposition=filename%3DSolum.pdf>. For an understanding of legal reasoning that tracks the aesthetic strand in narrative theory, see the discussion of the *lex talionis* in Desmond Manderson, *Songs Without Music: Aesthetic Dimensions of Law and Justice* (Berkeley, CA: University of California Press, 2000).

³⁹ See H. Patrick Glenn, *Legal Traditions of the World*, 2d ed. (Oxford: Oxford University Press, 2002) at c. 2.

C. *The Reform that Re-Forms*

The interactional pluralist conception has one further characteristic that is pivotal to understanding the theory of practice in law reform. While instrumental accounts imagine legal rules to operate almost exclusively as regulative—as governing behaviour that pre-exists the regulation—interactional pluralist accounts, by contrast, conceive of legal rules as also being constitutive.⁴⁰

In our view, these categories are perspectives. They are neither real, nor mutually exclusive. Legal rules typically operate in both dimensions.⁴¹ For example, property rules may govern pre-existing patterns of behaviour but they also generate novel forms of relationships and transactions.⁴²

In addition, constitutive rules have an explicit symbolic aspect that regulative rules typically lack. An agent who inhabits a constructed role has her understanding of the world shaped by that role. For instance, this is the rationale behind the loosely worded standards that permeate rules of professional conduct. A deontology cannot be fully captured by a detailed set of rules. Rather, the professional is assumed to inhabit a social role, which entails a particular worldview, and his or her obligations and possibilities flow from this.⁴³ The professional is

⁴⁰ We take this distinction from John R. Searle, *Speech Acts: An Article in the Philosophy of Language* (London: Cambridge University Press, 1969) at 33-42. To illustrate the distinction between constitutive and regulative rules, consider table manners and chess. Table manners impose a set of rules on the activity of eating. By contrast, constitutive rules construct both the activity that they govern, and the roles that flow from that activity. For instance, there is no pre-existing activity that the rules of chess govern; the rules of chess *create* the game of chess as well as the role of chess player.

⁴¹ Regulative rules, once enunciated, can construct social roles—and they do so both explicitly and implicitly. Table manners create the “head of the table” and demarcate those who are polite from those who are not. Similarly, constitutive rules, once followed, regulate behaviour—once again both explicitly and implicitly. The rules of chess govern the activity of “playing chess” to the point that it is possible to watch players hunched over a chessboard and conclude that, notwithstanding appearances, they are not playing chess. A fine elaboration of these points is given by Frederick Schauer, *Playing By the Rules* (Oxford: Clarendon Press, 1991) at 7.

⁴² For a contrast between “just there” and constructivist stories of property that track the distinction between regulatory and constitutive rules, see Carol M. Rose, “Property as Storytelling: Perspectives from Game Theory, Narrative Theory, Feminist Theory” (1990) 2 Yale J.L. & Human. 37.

⁴³ See H. Patrick Glenn, “Indépendance et déontologie judiciaire” (1995) 55 R. du B. 295. Arthurs has been particularly insightful on this point: for an excellent treatment of constitutive

assumed to symbolize ethical practice in terms of, and be symbolized by, a role and its attendant worldview.

A preoccupation with directly altering pre-existing behaviour characterizes instrumental law reform. This does not mean that the constitutive and symbolic functions of rules are absent from instrumentalist law reform measures, but rather that these functions are unacknowledged. Instrumentalist reform begets an instrumentalist symbol system and constitutes instrumentalist actors. For instance, many commentators perceive the field of law reform to be fully occupied by doctrinal problems, which it is the role of enacted legal rules to solve. A law reformer's primary role is simply to propose common-sense solutions to common-sense problems. By contrast, the interactional pluralist law reformer acknowledges the symbolic function of law reform. The constitutive and symbolic mission of law reform is consciously understood and self-consciously undertaken.

This difference in approach to symbolism leads to differences in how one perceives the structures, processes, outcomes, and institutions of law reform. The instrumentalist law reformer imagines a law reform commission to be merely an adjunct to state agencies. Similarly, since law is believed to be a one-way projection of authority from the state to the legal subject, the instrumentalist law reformer conceives the primary mission of law reform to be the production of the normative forms—statutes—by which the state usually projects its authority. The interactional pluralist law reform commission is more complex in both structure and activity, since it seeks to reflect and express the complexity of legal pluralism itself. If legal activity entails the constitution and mediation of narratives about relationships between the state and other normative actors, as well as narratives about relationships among non-state normative actors, then every site of its reform—including a law reform commission created by the state—will have to attend to all these narrative processes.⁴⁴

The Law Commission of Canada today acts as an interactional pluralist law reform commission. It owes its existence to a statute, yet its aspiration is not to function as a quasi-Ministry of Justice but rather to

dimension of reform of the legal profession, in the service of a progressive agenda see "Barristers and Barricades: Prospects for the Lawyer as a Reformer" (1976) 15 U.W.O. L. Rev. 59 at 71 ff.

⁴⁴ For a detailed elaboration of these two views, see Macdonald, "Recommissioning", *supra* note 2; Hurlburt's response, *supra* note 23.

engage non-state normative communities and actors in conversations about law.⁴⁵ The direction of its activity is diffuse. Sometimes, as when it distributes a final report, the activity flows from the state to normative communities. At other times, when it holds consultations about matters that are ultimately presented to legislators, activity flows from those communities to the state. And at still other times, as when it facilitates web-based discussion forums, sponsors plays, concerts, art shows, and organizes town-hall meetings, the activity is multi-directional and the Commission serves as a gathering place where conversations about legal norms happen.

If the activity of a pluralist law commission is non-hierarchical, interactive, and frequently quite informal, the idea of such a commission is also grounded in experience and is pluralist. Simply because the Law Commission of Canada has the name and pedigree of the state does not mean that it is the only extant law reform commission. An interactional pluralist conception of law implies an interactional pluralist conception of law reform and law reform commissions. The synagogue, the trade union, the neighbourhood, and the family are as much institutions of law reform as the Law Commission of Canada.⁴⁶ The directions of their law reforming activities are equally diffuse. At times, when a synagogue, union, or family et cetera, receives a tax benefit, the reform flows from the state to the community for specific implementation. At other times, as is the case when a position is advanced on a particular political issue or when a specific act of civil disobedience takes place, it flows from the community to the state. And still at other times, as in the case of discussion groups and neighbourhood forums, the institution is the place where conversations happen.

Fundamentally, the interactional pluralist law reform commission that bears the imprimatur of the state will consciously and actively engage in symbolic and aspirational activity. Freed from the constraining form of the draft statute, it would put on plays, visit

⁴⁵ The Commission was created by the *Law Commission of Canada Act*, S.C. 1996, c. 9. For a statement of the Law Commission's purposes and a description of its activities, see the website at <<http://www.lcc.gc.ca>>. See also Roderick A. Macdonald, "Law Reform and its Agencies" (2000) 79 Can. Bar Rev. 99.

⁴⁶ Arthurs has been astute in his analysis of legal pluralism and particularly, in its application to the labour law context. See e.g. "Landscape and Memory: Law, Legal Pluralism and Globalization" in Ton Wilthagen, ed., *Advancing Theory in Labour Law and Industrial Relations in a Global Context* (Amsterdam: Elsevier Science, 1998) 21 at 27-8.

schools, and post vignettes about law on its website. The constitutive purpose of such activity is clear. By altering the form of its activity, the commission attempts to alter the substance of legal subjectivity. If the legal subject of the nineteenth-century statute is the citizen recidivist obeying statutory commands, that of the modern legal artefact is the active participant in the construction of the law's normative meaning. Likewise unofficial law reform commissions constantly undertake symbolic law reforming activities. The unwritten rules of everyday family, neighbourhood, workplace, and religious ritual powerfully constitute and alter roles for each of us.⁴⁷ Of course, as in most law reform projects, state and non-state actors are deeply implicated. The activities and sites of unofficial and official law reforming clearly intersect and overlap. In these moments, the instrumental and the symbolic stakes are negotiated together in both unofficial and official locales.⁴⁸

* * *

The theory of practice in contemporary law reform is almost always implicit. In this Part we have made these tacit presuppositions manifest by presenting a pluralist interactional theory of law reform, its agencies, and its processes. We have argued for a conception of legal norms that affirms and cultivates human agency, and countered the dominant view of law reform, which, in its focus on the command function of rules, renders legal subjects mere objects rather than agents of legal activity. As a corollary, we have proposed a conception of law

⁴⁷ For example, the role of the favourite son is a construction of patterns of interaction with his parents and siblings, and the fact of that construction, as much as changes to it can be understood as a kind of reform; Joseph's self-understanding, as well as the lens through which he sees the world at least in part results from parental gestures of affection (giving him a multi-coloured coat), sibling expressions of enmity (leaving him in a well), and changes in both his own situation, and that of his family (his being a member of the royal court and their position as supplicants). See *The NRSV Harper Study Bible*, (Grand Rapids, MI: Zondervan, 1991) at Genesis 37. See generally Roderick A. Macdonald, *Lessons of Everyday Law* (Montreal: McGill-Queens University Press, 2002).

⁴⁸ For an illustration of how this can be achieved in a context involving public institutions, see Law Commission of Canada, *Institutional Child Abuse—Restoring Dignity: Responding to Child Abuse in Canadian Institutions* (Ottawa: Minister of Public Works and Government Services, 2000). In the family law context, see generally Robert Leckey, "Harmonizing Family Law's Identities" (2002) 28 Queen's L.J. 221. In the particular context of marriage as a social construct and constitutional doctrine, see Kong, *supra* note 9.

reform in which the law-creating activity of non-state and non-professional actors is given its due place. We reject the dominant view of law reform's *prima facie* privileging of the state as a source of legal norms, and of legal professionals as guardians of the state's outputs.

III. THE PRACTICE OF THEORY IN LAW REFORM

We turn now to a discussion of two contemporary instances of state-sponsored law reform as illustrations of the practice of theory: how might a pluralist interactional theory of law inform the state's own practices of law reform? Our first example, elaborated in Parts III(A) and III(B), is the ongoing process of law reform reflected in the flow of amendments to the CCQ since its enactment in 1993.⁴⁹ In these sections we show how the Quebec legislature has shown awareness of the possibilities of pluralist interactional law reform. Our second example, as discussed in Part III(C), is the attempt of states previously of the civil-socialist legal tradition to enact workable codes so as to enter a global trading system dominated by common law ideology.⁵⁰

The choice of these two instances of codal revision may initially appear curious. After all, is not a civil code meant to obviate the need for ordinary law reform by casting its prescriptions at a sufficient level of generality so that their meaning can evolve through time?⁵¹ The nineteenth-century civil code was to function not like an ordinary statute directed to reforming the law, but rather like the historical common law. Recall that until the politics of the late nineteenth century froze its development, common law was constantly evolving without significant legislative intervention to "work itself pure."⁵² Explicit legislative amendment was needed only to effect an institutional restructuring (for

⁴⁹ For a complete listing of these amendments see Nicholas Kasirer & Jean-Maurice Brisson, *Code civil du Québec: Édition critique 2004-2005*, 12th ed. (Montreal: Yvon Blais, 2004).

⁵⁰ On the distinctiveness of the former socialist legal tradition as a subset of the civil law tradition, see René David & John E.C. Brierley, *Major Legal Systems in the World Today*, 3d ed. (London: Stevens, 1985) Part II.

⁵¹ The central features of a code in the civil law tradition are canvassed in Paul-André Crépeau, "Une certaine conception de la codification" in Jean-Guy Belley, ed., *Un Code civil du Québec: contribution à l'histoire immédiate d'une codification réussie* (Montreal: Édition Thémis, 2005) 23. See also John E.C. Brierley & Roderick A. Macdonald, *Quebec Civil Law* (Toronto: Emond Montgomery, 1993) at 98-118.

⁵² See Karl Llewellyn, *The Common Law Tradition: Deciding Appeals* (Boston: Little Brown, 1960). For the source of this expression, see *Omychund v. Barker* (1744), 26 E.R. 15 at 23.

example, of courts), a redistribution of entitlements in land, a reconfiguration of status relationships, or the transference of a legal field from private to public law regulation.⁵³

Consider, first of all, codal revision in Quebec. By the mid-1960s, the pressure for law reform in the guise of a complete recodification of private law appropriate for post Quiet-revolution Quebec became irresistible. After twenty-two years of work the Civil Code Revision Office submitted its Final Report in 1977, and sixteen years after that a new CCQ was proclaimed.⁵⁴ Yet despite the care that went into preparing this legislative “fresh start,” almost from the moment the CCQ entered into force, its text has been amended.⁵⁵

The seemingly ad hoc character of these diverse amendments led the Quebec Bar Association to release a brief in 2002 condemning the work of the National Assembly of Quebec. The Bar critiqued the proposed Bill 50, *An Act to Amend the Civil Code and other legislative provisions*⁵⁶ for failing to pay sufficient attention to the CCQ’s internal structure.⁵⁷ Two flaws in the practice of theory were signalled: to begin,

⁵³ See J.H. Baker, *An Introduction to English Legal History*, 3d ed. (London: Butterworths, 1990); M. Planiol, “De l’inutilité d’une revision générale du Code civil” in *Le Code civil, 1804-1904: livre du centenaire*, vol. 2 (Paris: Rousseau, 1904) 954; and Brierley & Macdonald, *supra* note 51 at 74-88.

⁵⁴ For a general assessment of the re-codification process, see Brierley & Macdonald, *supra* note 51 at 89-97; J.-G. Belley, ed., *Un Code civil du Québec: contribution à l’histoire immédiate d’une codification réussie* (Montreal: Édition Thémis, 2005).

⁵⁵ The history of the Civil Code of Lower Canada suggests the inevitability of immediate amendment. An exhaustive compendium of amendments of the Civil Code of Lower Canada from 1866-1985 may be found in Paul-André Crépeau & John E.C. Brierley, *Code civil: Édition critique 1866-1980* (Montreal: Chambre des Notaires, 1981), and supplement, 1985. Since the CCQ was proclaimed in force on 1 January 1994, the amending statutes have been copious, have ranged across diverse areas of the private law, and have had a heterogeneous scope and focus. Sometimes the amendments have been subjacent to the reform of extra-codal statutory regimes, where the alterations to the CCQ have been incidental; at other times, the CCQ has been the focus of reform, and other statutes have been touched incidentally; and at still other times the CCQ has been the exclusive target of reform. Moreover, the techniques of codal reform have been equally varied as there has been no discernable pattern in terms of either motivations or purposes. At one moment, the revisions have been cosmetic, or of a housekeeping nature; at another substantive and responsive to profound social change.

⁵⁶ S.Q. 2002, c. 19 [CCQ Amendment Act].

⁵⁷ See *Commentaires du Barreau du Québec sur la Loi modifiant le Code Civil*, online: Barreau du Québec <<http://www.barreau.qc.ca/opinions/memoires/2001/p150.pdf>>. With this intervention, the Bar addressed a topic—the forms, processes, and agencies of everyday codal amendment—that has been generally neglected in civil law countries, despite the fact that there is an extensive literature on the related questions of codification and recodification. For two excellent

given the CCQ's unique role as a "civil constitution" expressing mostly constitutive rather than regulative rules, amendments should respect its nature and internal logic;⁵⁸ in addition, given a code's vocation in stating comprehensively the *ius commune* and announcing dialogic pairs of general principles "*féconds de conséquences*,"⁵⁹ institutional responsibility for reform should be delegated to a specialized codal reform agency, instead of being subject to the momentary and inexperienced impulses of the legislative process.⁶⁰

Of course, these two concerns are unique neither to Quebec nor to the civil law.⁶¹ They can also be found in legislative law reform projects undertaken by former socialist republics of central Europe. Many of these republics undertook recodification during the 1990s. However, the models in view were often not well attuned to

examples recounting the experience in Quebec, see J.E.C. Brierley, "Quebec's Civil Law Codification: Viewed and Reviewed" (1968) 14 McGill L.J. 521; J.E.C. Brierley, "The Renewal of Quebec's Distinct Legal Culture: The New Civil Code of Quebec" (1992) 42 U.T.L.J. 484.

⁵⁸ Brierley & Macdonald, *supra* note 51 at 33-45. In Quebec, the federal constitution creates a further dimension to the task of maintaining the integrity and logic of the CCQ as a "civil constitution." See e.g. J.-M. Brisson, "L'impact du Code civil du Québec sur le droit fédéral" 52 (1992) R. du B. 345 at 346-49 and 357; the essays collected in *The Harmonization of Federal Legislation with Quebec Civil Law and Canadian Bijuralism* (Ottawa: Department of Justice, 1997); and Kong, *supra* note 9.

⁵⁹ The expression is from Jean-Étienne-Marie Portalis, "Discours préliminaire," in P.A. Fenet ed. *Projet du Code civil* (Paris: Lepetit jeune, 1827) 463. The suggestion to create an independent monitoring body was made by Portalis and by the Codification commissioners in Lower Canada: see *Civil Code of Lower Canada: Sixth and Seventh Reports and Supplementary Report* (Quebec: George E. Desbarats, 1865) at 262-64. The idea of a necessary dialogic tension between explicit codal texts was first expressed by Louis Josserand at the turn of the twentieth century. See Daniel Jutras, "Louis and the Mechanical Beast or Josserand's Contribution to Objective Liability in France" in Ken Cooper-Stephenson & Elaine Gibson, eds., *Tort Theory* (North York: Captus Press, 1993) 317.

⁶⁰ The Bar noted that at the time the CCQ was enacted, the National Assembly also passed a statute creating the *Institut québécois de réforme du droit* (*An Act respecting the Institut québécois de réforme du droit*, S.Q. 1992, c. 43) to superintend the process of amending the CCQ, but that since that time no action had been taken to create the imagined body. The Bar also gave two illustrations of the consequences of not doing so: first, a number of amendments were merely technical or housekeeping and should have been made in extra-codal legislation; second, the choice of amendments to prioritize seemed haphazard—representing responses to political lobbying, or need felt by the government—and no justification either for these choices or for not proceeding with amendments that professional associations had been long advocating, was offered.

⁶¹ The concerns revolve around defects signalled by common law jurists who fear for the integrity and coherence of the common law. For an analysis of the appeal of civil codes as means of achieving doctrinal coherence in common law jurisdictions, see Gunther A. Weiss, "The Enchantment of Codification in the Common Law World" (2000) 25 Yale J. Int'l L. 435.

contemporary practice, especially in the commercial law field. In response to this misfit between theoretical models and on-the-ground legal conditions, there arose an implied threat of the International Monetary Fund, or the promised munificence of the World Bank. This impulse often led to transplants that did not take root and were immediately rejected.⁶² Yet this immediate rejection did not always happen. Sometimes these new regimes appear to take root. Their initial success in specific fields of commercial law does not, however, endure. Moreover, whatever temporary benefit they generate is soon overtaken by the perverse consequences affected elsewhere in the legal system.⁶³

A. *Explicit, Textual Law Reform*

Contemporary law reform measures can be plotted on to a four-cell table that distinguishes along one axis those which are explicit from those that are implicit, and along the other axis those that are textual from those that are non-textual. Textual law reform might mean one of two things. First, the text itself could be imagined as the target of reform—the reform of a text; or the text can be imagined as the vehicle of the reform—the reform by a text. We use the expression explicit law reform to signal reform of a text, and we use the expression textual law reform to signal reform by a text.⁶⁴

⁶² The case of Ukraine is instructive in this regard. There, an initial attempt to enact a variant of Article 9 of the U.S. *Uniform Commercial Code* was given first reading, but following significant resistance from the legal professions was completely overhauled and replaced on second reading by a new law consistent with indigenous social, economic, political, and legal practices. This revised law was enacted and proclaimed in force on 1 July 2004. See the discussion in Roderick A. Macdonald, *Commentaries on the Law of Ukraine on Charges and other Rights of Creditors* (Kyiv: World Bank), Part I, [forthcoming in 2006] [Macdonald, *Ukraine*].

⁶³ Romania may be cited as a case in point for this proposition. See *Law regarding some steps to speed up economic reform*, Law No. 99 of 26 May 1999, a project of the World Bank (IBRD), as presented and discussed in N. Pena & H.W. Fleisig, "Romania: Law and Security Interests in Personal Property and Commentaries" (2004) 29 Rev. cent. & E. Eur. L. 133.

⁶⁴ In other words, not only does the law reformer have to consider the normative artefact—legislation, judicial decision, practice, doctrinal expression, appeal to principle, et cetera, as a vehicle by which reform occurs, but also the normative regime and structural features of the artefact being modified. Consider the constitution. Is the object to amend a document such as the "constitution" a code, statute, regulation, policy statement, or written case *ratio*? Or, is the object an amendment to an unwritten constitutional principle? Or a rule arising in the common law, custom, practice, or public policy? Arthurs' analysis of the structure and institutional limits of legislation has been prescient and profound. See "Regulation Making: The Creative Opportunities of the Inevitable" (1970) 8 Alta L. Rev. 315.

Our focus in this section is textual law reform. Archetypically, this involves deploying a canonical linguistic formulation to repeal, amend, or replace the words of some other canonical text—a legislature enacting a statute to affect another statute. But it might also involve deploying a canonical formulation to repeal or amend a legal rule that has never been given an explicit canonical formulation—a legislature enacting a statute to affect a customary or common law rule. And it also occurs every time a statute merely purports just to codify a common law rule since the very act of rendering a legal rule into a canonical formulation will modify it.⁶⁵

The amendment history of the CCQ since 1993 reflects the diversity of textual and explicit law reform. Activity over the past decade reveals three general types of substantive legislative objective. Some amendments were intended to change political terrain—that is, to create a new social reality. Others were largely conjunctural—that is, intended to reflect a new social reality, to respond to judicial decisions, or to address the concerns of lobby groups. Still other amendments had a purely aesthetic or cosmetic objective and were meant to clarify or rationalize linguistic usages.⁶⁶

Legislative reforms can also be classified according to their techniques—to sort out exactly what is being changed textually: Is the objective to delete and recodify a single legal rule? Is it to change a title, an article, or part of an article? Is it to insert and elaborate a new concept? Or is it to change several articles in the pursuit of a single objective? Of course, the choices a legislature makes with respect to substantive codal reform may bear on the kinds of techniques it uses, and vice versa. In this section we organize our various examples using the legislative objective being pursued as the primary category.

⁶⁵ Of course, textual law reform need not be exclusively the work of a legislature. Every time parties renegotiate a contract or a collective agreement, every time a person rewrites a will or adds a codicil, every time a body of electors amends a constitution, and every time a written contract is drafted to reflect what parties have already been agreed upon, we are in the presence of textual law reform.

⁶⁶ We have not included within our inventory amendments that involved the Civil Code of Lower Canada, most notably the 1980 reform *An Act to establish a new Civil Code of Québec and to reform family law*, S.Q. 1980, c. 39, nor the various implementation and transitional measures introduced since 1992, notably, *An Act to implement the new Civil Code of Québec*, S.Q. 1992, c. 57.

The purpose of this exercise in legal taxonomy is to illustrate the general claim that different aspects of a legislative text give rise to different reform effects. The legislative ukase is never unmediated and its form and substance are necessarily shaped by the structural features of the instrument through which it is enunciated.⁶⁷

1. Creating a New Social or Legal Reality

Several amendments to the CCQ since 1993 have been enacted with the ambition of not merely reflecting a new social reality, but creating a new reality—that is, pre-emptively enacting changes to a system in order to change behaviour within that system. Here are four illustrations of different ways in which the legislature has pursued this goal.

Sometimes it has altered a set of related articles in light of a single policy objective.⁶⁸ At other times, it has deleted a particular article, in whole or in part, to produce a change in practice.⁶⁹ Sometimes it has amended a rule because the current law shapes an unsettled framework of social practices, typically with regard to family relationships, in a manner at odds with the legislature's preferences.⁷⁰

⁶⁷ A civil code presents a particularly salient set of such features, for the reasons given above. But non-codal legislation, whether in common or civil law jurisdictions, does not have a uniform form, and can raise analogous concerns. This is true across time. The early English statute differed radically in form, content, and purpose from the archetypical nineteenth century statute. See Desmond Manderson, "Statuta v. Acts: Interpretation, Music, and Early English Legislation" (1005) 7 *Yale J.L. & Human.* 317; Roderick A. Macdonald, "The Fridge Door Statute" (2001) 41 *McGill L.J.* 11. Within a given jurisdiction at a given moment, a constitution, a human rights act, an income tax act, and a beekeepers' act will each exhibit distinctive internal architectures. It follows that law reformers must be cognizant of both the symbolic and concrete effects that are involved with the choice to deploy or not deploy particular legislative forms.

⁶⁸ *An Act to amend the Civil Code and other legislative provisions relating to land registration*, S.Q. 2000, c. 42 [*Land Registration Amendment Act*] aimed at establishing a more efficient system for the publication of rights to enhance the commodization, development, and exploitation of land.

⁶⁹ *Ibid.* This act repealed articles 3060 and 3064 in order to change the conditions under which the registrar may cancel as of right various forms of security and a court may order cancellation of registration of certain judgements.

⁷⁰ *An Act to amend the Civil Code as regards the obligation of support*, S.Q. 1996, c. 28, s. 1, limited the support obligation to parents in order to protect the elderly from being financially burdened by claims from their grandchildren.

And still, at other times, it has modified a codal rule in order to regulate uncertain commercial practices.⁷¹

2. Reflecting Social and Legal Reality

On other occasions, codal amendments are primarily reactive. In such cases legislatures enact amendments meant to reflect changes in society, or to reflect or correct legal change effected by courts or by other statutes. A prime examples of this species of codal amendment would be changing a rule to reflect an already crystallized change in social beliefs and practices.⁷² Another would be modifying a rule to reflect a change in perception about which institutional structures are legitimate.⁷³ A third example would involve altering an article to respond to a judicial decision that causes confusion.⁷⁴ Still another example would be an amendment that brought the code into line with extra-codal statutory change.⁷⁵ A final example would be an amendment responding to discrete problems in particular regulatory fields rather than reflecting a general shift in social mores.⁷⁶

⁷¹ *An Act to amend the Civil Code and other legislative provisions as regards the publication of personal and movable real rights and the constitution of movable hypothecs without delivery*, S.Q. 1998, c. 5, amended article 1852 by adding two paragraphs to provide for the publication of long-term leases of movables.

⁷² *An Act to amend the Civil Code as regards names and the register of civil status*, S.Q. 1999, c. 47, s. 3, permits parents who are neither English nor French to name their children using the symbols of their own language. With this change, language and naming is symbolically cognized as a relevant ground of cultural definition for both majority and minority cultures. Insofar as the act of naming a child is an act of cultural affirmation, the provision only affects those who would so define themselves on linguistic grounds. On the general point about how parental practices shape cultural communities, see Shauna Van Praagh, "The Education of Religious Children: Families, Communities and Constitutions" (1999) 47:3 Buff. L. Rev. 1343.

⁷³ *An Act to provide for the implementation of agreements with Mohawk communities*, S.Q. 1999, c. 53, s. 19, recognizes the capacity of Mohawk officials to celebrate marriage even if they do not hold a recognized religious office, or exercise authority as designated municipal officers.

⁷⁴ *An Act to amend various legislative provisions respecting municipal affairs*, S.Q. 1999, c. 90, s. 42 [*Municipal Affairs Amendment Act*], added article 2654.1 in order to overrule a judgement refusing to recognize that a municipality's land tax claims survived the sale of the taxed property. See *Chateau d'Amos Ltée (syndic de)*, [1999] R.J.Q. 2612 (C.A.) [*Chateau d'Amos*].

⁷⁵ *Municipal Affairs Amendment Act*, *ibid.*, s. 41, 44, alters articles 2651 and 2656 in order to align the Code with municipal tax legislation.

⁷⁶ To address a specific problem in the real estate industry, the legislature proposed Bill 50, a measure that would have altered the responsibility of a vendor of an immovable under article 1726 for latent defects. In the late 1990s, homeowners became aware of problems caused by backfill that included pyrite as one of its ingredients. This defect in construction was widespread, and the

3. Aesthetic Change

A surprising number of legislative amendments are simply technical, interpretive, aesthetic, or cosmetic. Often, however, these amendments are loaded with symbolic freight. For instance, an amendment may alter a title or heading because the language reflects a bad translation.⁷⁷ An amendment may attempt to ensure coherence in the interpretation of codal provisions.⁷⁸ An amendment may also change terminology because it is symbolically charged.⁷⁹ Finally, a legislative amendment may be motivated by purely stylistic reasons.⁸⁰

* * *

Through the variety of techniques used in achieving different legislative objectives one can see that the legislature is at least aware of

proposed amendment would have limited the vendors' exposure to lawsuits for latent defects to a period of five years. Due to opposition from consumer groups, the proposed amendment was never enacted. See Association des Consommateurs pour la Qualité dans la Construction, online: <<http://www.consommateur.qc.ca/acqc>>.

⁷⁷ *An Act respecting the protection of persons whose mental state presents a danger to themselves or to others*, S.Q. 1997, c. 75, s. 28 [*Mental State Act*], modifies the heading of Section II of Chapter I, in Title II of Book I. "Establishment and Psychiatric Examination" is replaced by "Institution and Psychiatric Assessment."

⁷⁸ *Mental State Act*, *ibid.*, s. 1 explicitly states the need to interpret the CCQ and statutory provisions consistently with one another.

⁷⁹ *Ibid.*, replaces the phrase "legislation respecting the protection of mentally ill persons" with "the Act respecting the protection of persons whose mental state presents a danger to themselves or to others," implicitly acknowledging that the phrase "mentally ill persons" carries a judgement about the entire person, while the construction "person whose mental state presents a danger" focuses on the mental state and its effects.

⁸⁰ *The CCQ Amendment Act*, *supra* note 56, addresses discordances between the French and English versions of codal provisions, not by declaring the French text authoritative, but by correcting the English version.

However, as is noted in Nicholas Kasirer & Jean-Maurice Brisson, *Code civil du Québec: Édition critique 2002-2003*, 10th ed. (Montreal: Yvon Blais, 2004), the changes flow in one direction, from a presumptively authoritative French version, to a presumptively flawed English one. As the editors note, these presumptions reveal themselves both in section fifteen's statement that (only) the English text is amended, and in the failure to alter the French text, where the English terminology better expresses the concept denoted. Rather than finding a substitute such as "détenteur" for the overbroad term "propriétaire," the more apposite term "holder" is replaced with "owner." See *supra* note 56, s. 15, para. 30. See also Pierre Legrand, "Codification and the Politics of Exclusion: A Challenge for Comparativists" (1998) 31 U.C. Davis L. Rev. 799 at 803, for a critique of the holding in *Municipalité de Verdun v. Doré*, [1995] R.J.Q. 1321 at 1327, which privileges the French version of the codal text.

the semiotic dimension of legislation, even if it is not particularly attentive to it.⁸¹ Statutes that make a code's content consistent with extra-codal legislative changes usually instantiate an instrumental, regulative purpose. The motivations for such amendments are usually subsidiary to extra-codal instrumental ends, and as a consequence, typically do not aim to achieve significant symbolic or infra-codal effects. These efforts constitute the bulk of legislative efforts affecting the code;⁸² only rarely does legislation specifically and primarily target the CCQ.⁸³ Nonetheless, because the text of legislation is being altered, in these cases one also sees the potential for deploying the symbolic and interactional character of a code to achieve constitutive ends. This potential can be realized when legislatures, unlike the approach taken by the National Assembly of Quebec in most of its efforts since 1993, acknowledge how different species of legislative change and different forms of legislative text can invite citizens to constitute novel social roles for themselves.

B. *Implicit, Non-textual Law Reform*

In addition to these textual and explicit methods of law reform—where a legislative text directly modifies another legislative text—there are a myriad of non-textual and implicit processes of law reform. Even when the object of law reform is a particular legislative text, reforming activity can take diverse forms, deploy different techniques, and

⁸¹ On the symbolic function of civil codes and the semiotic stakes implicated by codal change, see Michael McAuley, "Proposal for a Theory and a Method of Recodification" (2003) 49 *Loy. L. Rev.* 261.

⁸² See, in addition to statutes already discussed, *An Act to amend the Act respecting the implementation of the reform of the Civil Code of Québec*, S.Q. 1995, c. 33, s. 2; *An Act respecting the Ministère des Relations avec les citoyens et de l'immigration and amending other legislative provisions*, S.Q. 1996, c. 21, ss. 27-29; *An Act to amend the Public Curator Act and other legislative provisions relating to property under the provincial administration of the Public Curator*, S.Q. 1997, c. 80, ss. 46-48; *An Act to amend the Code of Civil Procedure and other legislative provisions in relation to notarial matters*, S.Q. 1998, c. 51, ss. 2-26; *An Act to amend certain legislative provisions respecting the Public Curator*, S.Q. 1999, c. 30 ss. 21-22; and *An Act respecting la Financière agricole du Québec*, S.Q. 2000, c. 53, s. 67.

⁸³ The notable exceptions are *An Act to amend the Civil Code and other legislative provisions*, S.Q. 2002, c. 19 and *An act to reform the Code of Civil Procedure*, S.Q. 2002, c. 7.

originate in diverse sites. The forms and agencies of law reform remain irreducibly plural and interactional.⁸⁴

The general aim of this section is to consider how legislative texts can be modified without explicit amendment of their language.⁸⁵ If the central concern is the reform of a civil code, it might be thought otiose to consider non-textual law to form part of the code's substance. Is the code not a text? What in a code is non-textual? With their exclusive focus on what is expressly enunciated by the legislature, these questions presuppose a monist and instrumentalist conception of law and law reform: monist because they presume the legislature to be the primary site of legal normativity; instrumentalist because they dismiss the symbolic dimensions of a code that lie beyond the reach of express legislative intention and action.

Such a conception projects an image that is the antithesis of what a code purports to be. A code cannot be reduced to its artefacts—its rules, concepts, and institutions—but must be understood interactionally and pluralistically: interactionally, because a code is never just a compendium of express commands issuing forth from the legislature; pluralistically, because the sources of its normative content and the means by which it is shaped are diverse.

The present Preliminary Provision of the CCQ, which expressly states what is implicit in any civil code, reflects this pluralistic and

⁸⁴ The diversity of sites of legal normativity within the state, is of course, the gravamen of Arthurs' critiques of Diceyan rule of law theory, especially as it was articulated in the McRuer report. See "Rethinking Administrative Law: A Slightly Dicey Business" (1979) 17 Osgoode Hall L.J. 1.

⁸⁵ This can occur as a result of canonical texts—statutes, contracts, the work of private legislatures like the Uniform Laws Commission and the Canadian Securities Administrators, as well as in consequence of the invocation of non-canonical texts—cases, policy statements, and manuals. On private legislatures see A. Schwartz & R. E. Scott, "The Political Economy of Private Legislation" (1995) 143 U. Pa. L. Rev. 595. In this section, we also consider how non-textual norms can be modified through means besides explicit textual law reform in the form of a statute. Again, these can be canonical practices such as trade usages and custom of an industry, or they can be non-canonical, as in constitutional principle, equity, and public policy. Taken together with the preceding section's discussion, this suggests that there are at least four normative regimes at play in the reform of a given legislative text: textual-explicit law reform (the standard instance in the imaginary of most scholars); textual-inexplicit law reform (what is usually called conflicts of law in time by experts in statutory interpretation); non-textual-implicit law reform (judicial interpretation, changing practices); and non-textual-explicit law reform (in certain cases, constitutional interpretation). For elaboration of this taxonomy see Roderick A. Macdonald, "Pour la reconnaissance d'une normativité implicite et « inférentielle »" (1986) XVIII Sociologie et Sociétés 47.

interactional conception of a code. The second paragraph of the Preliminary Provision, pointing to the code's function as *jus commune*, provides:

The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the code is the foundation of all other laws, although other laws may complement the code or make exceptions to it.

The Preliminary Provision acknowledges that the CCQ is more than what the legislature at any given moment states it to be: the substance of a code is also comprised of unwritten norms and shaped by other laws and other actors. What, then are the diverse non-textual sources and processes that contribute to shaping a code's content?

1. Modifying the textual code without changing the text

Not surprisingly, the agents by which implicit codal reform may be effected are the same as those that modify the text of the code. Before examining the usual possibilities, it is important to signal one highly ambiguous situation. In the Canadian constitutional system, only the legislature or its delegates has the power to enact, modify, or repeal laws.⁸⁶ There is one quasi-exception. When a court determines that a particular enactment is unconstitutional, whether from the application of sections 91, 92, and 96 of the *Constitution Act, 1867*, or from the application of the *Charter of Rights and Freedoms*, the normative effect of the declaration is clear. The impugned provision is of no force and effect. But its semiotic status is less clear. Is constitutional interpretation simply a judicial pronouncement as to the effect of a text, or does it in some measure erase the text?⁸⁷ If the latter, when a codal provision is at issue, we are in a situation where the text of the code has been modified by a non-textual process.

⁸⁶ *Interpretation Act*, R.S.C. 1985, c. I-21, s. 31(4).

⁸⁷ To take a dramatic example, in *Reference re Manitoba Language Rights*, [1985] 1 S.C.R. 721, did the Supreme Court of Canada merely pronounce on the validity of Manitoba's legislation, or was the semiotic effect of its holding to erase these statutes entirely? Consider also the effect of the *Act respecting the revised statutes of Quebec*, R.S.Q. 1888, c. 5, s. 1, and the *Act respecting the revised statutes of Canada*, S.C. 1886, c. 4, both of which purported to declare (not always identically) which provisions of the pre-confederation *Civil Code of Lower Canada* passed under federal jurisdiction, and had been modified by the federal law between 1866 and 1886.

The most common situations of implicit codal reform are those that involve legislative action. These forms of external legislation may be of two types. They may be systemically external, as in the case of a binding treaty or the effect of federal legislation, or they may be systemically internal, as in the case of a statute of the National Assembly of Quebec. Consider first the application of federal law. Imagine that the Parliament of Canada were to provide that the age of capacity to undertake certain banking transactions was twenty-one. This statute implicitly amends the provisions of the CCQ on consent to contract. Or imagine that federal law were to provide that a bank might take security under section 427 of *An Act respecting banks and banking* without further formality.⁸⁸ This statute implicitly amends the provision of the CCQ on the legitimate causes of preference.⁸⁹

What then of provincial legislation? Here again, a statute outside the Code may not only derogate from a codal prescription by constraining or expanding its application, but may actually overrule the text. This flies so directly in the face of the purpose of a code that there were often attempts, as in Quebec in an 1868 statute,⁹⁰ to prohibit implicit amendments to the CCQ, directing the court to interpret any such provision as not affecting the CCQ unless it expressly so stipulated.

When it is the content of a codal text that is being amended without the text itself being changed, this normally happens by ordinary interpretation. Here, judges and other adjudicators who “state the law” are the primary actors. The case of the invention of “constitutional principles”—the explicit reading down, up or sideways of a text by virtue of the constitution—or ordinary rules of interpretation when two legislative provisions appear to be in conflict, have already been considered above. Often, however, the judiciary simply interprets a text in a manner that the legislature did not imagine. In so doing, their reform efforts can be positive or negative in direction. At times judicial interpretation produces an immediate legislative response, as in *Chateau*

⁸⁸ S.C. 1991, c. 46, s. 427 [*Bank Act*].

⁸⁹ See Roderick A. Macdonald, “Encoding Canadian Civil Law” in John E.C. Brierley *et al.* *Mélanges Paul-André Crépeau* (Montreal: Yvon Blais, 1995) 579.

⁹⁰ See *An Act respecting the Interpretation of the statutes of this province*, S.Q. 1868, c. 7, s. 10.

d'Amos.⁹¹ At other times, it does not, as in *Lefebvre (Trustee of); Tremblay (Trustee of)*.⁹²

Courts frequently interpret the text of the CCQ positively, rather than in a manner that negates its meaning. For example, in *St-Jean v. Mercier*,⁹³ the Court found article 1053 of the Civil Code of Lower Canada (now article 1457 of the CCQ) unclear as to whether causation in civil responsibility was to be understood as a question of fact. The Court decided that the determination of causation raises questions of fact, whereas that of fault raises a mixed question of fact and law.

Occasionally, the judiciary, through interpretation, consciously overrules what appears to be the express intention of the legislature. On occasion this can be direct, as where the judicial interpretation may produce significant codal effects whenever a particular word is used elsewhere in the CCQ. In perhaps the most striking example of negative reform, *Banque Nationale v. S(S.)*,⁹⁴ the Court of Appeal simply refused to acknowledge what the legislature manifestly stated to be the law. At other times the impact can be indirect, as when the court interprets a codal provision in a manner that changes the meaning of other articles or external law.⁹⁵

In addition to the judiciary, there are other institutions whose processes and practices contribute to the reform of the CCQ. These, on the one hand, include those whose practices inform the living law of the code—police and other public officials, unions, corporations, individual lawyers, and notaries. But these types of codal reform are generally speaking, so implicit that they are also subliminal; not only is the text

⁹¹ *Supra* note 74.

⁹² [2004] 3 S.C.R. 326.

⁹³ [2002] 1 S.C.R. 491 at 98-104.

⁹⁴ [2000] R.J.Q. 658 [*Banque Nationale*]. In *Banque Nationale*, the Quebec Court of Appeal held that, despite the use of explicit language ("deemed") that raises an irrebuttable presumption of fraud in article 1632 in circumstances where a contracting party knew the debtor to be insolvent, this article would be incoherent since it would not permit the contracting party a defence of good faith. The incoherence arises not because of conflicting textual evidence within the CCQ, but rather because of a perceived failure of the article to cohere with either previous jurisprudence, or academic opinion on the nature of the Paulian action.

⁹⁵ In *Caisse populaire Desjardins de Val-Brillant v. Blouin*, [2003] 1 S.C.R. 666, the Court held, in order to permit a person not carrying on an enterprise to hypothecate movable property with delivery under article 2683, that a non-negotiable deposit certificate was corporeal property capable of possession—a conclusion at odds with other provisions of the CCQ and with the federal *Bills of Exchange Act*, R.S.C. 1985 c. B-4.

unaltered, but often there is no official recognition of a change. By contrast, at times these processes and practices do generate official interpretative change in courts. This most often occurs where the practice in question is explicitly normative. Here one might signal doctrinal writing by law professors,⁹⁶ briefs, memoranda by professional associations like the bar and board of notaries, and even professional practice through strategic litigation by advocates.

In one sense, all these interpretive acts can be understood within the dominant theory of law: they are mere instances of the judiciary and professional and academic commentators instantiating through application the intention of the legislature.⁹⁷ The interpretive outputs are the vessels through which the legislative command is given substance. However, if we consider judicial, professional, and academic writing to be normative artefacts that do not simply derive their legitimacy from a subservient relationship to a code—that is, if we conceive of them as distinct sites of legal normativity—then a different image emerges. The judiciary, bar associations, and academia become participants in a wide-ranging dialogue. This dialogue is undertaken in the manner of Postema's conception of common law adjudication about the meaning of norms. In the end, decisions, memoranda, and law reviews become active sites of law reform.⁹⁸

⁹⁶ In *Banque Nationale*, *supra* note 94, the Court of Appeal relied upon the work of academic commentators, notably Jean-Louis Baudouin & Pierre-Gabriel Jobin, *Les Obligations*, 6th ed. (Montreal: Yvon Blais, 2002) to overrule a codal definition. Similarly, in *St-Jean v. Mercier*, *supra* note 93, the Court relied on the opinions of various academic commentators in explicating an unclear codal text.

⁹⁷ See Jacques Ghestin & Gilles Goubeaux, *Traité de droit civil: Introduction générale* (Paris: L.G.D.J., 1993) for an elaboration of this conception of judicial and academic interpretation in the civil law tradition. More recently, such a theory of statutory interpretation in the common law has been announced by Antonin Scalia, "The Rule of Law as a Law of Rules" (1989) 56 U. Chicago. L. Rev. 1175.

⁹⁸ In other words, the substance of a civil code, like that of a constitution, does not reside primarily in its text. Rather, it lies in the institutional practices of those who have a stake in the text's operation in society. On this conception of codal interpretation see Roderick A. Macdonald, "Understanding Civil Law Scholarship in Quebec" (1985) 23 Osgoode Hall L.J. 573. In relation to constitutions, see Karl N. Llewellyn, "The Constitution as an Institution" (1934) 34 Colum. L. Rev. 1.

2. Modifying the non-textual code

The most complex and subtle form of codal amendment occurs when an agent with no formal authority to amend the text seeks to modify the non-textual content of a code. In framing the inquiry this way, one means to exclude the legislature. Yet legislation can often produce an amendment to the non-textual content of the code without turning that implicit law into a legislative rule—either within the code or in some other statute. For instance, the legislature can indirectly alter commercial practices in a way that changes either a legislative provision's significance or its scope of application.⁹⁹

Most frequently, however, amendment to non-textual codal law is effected through interpretation. Non-textual codal law can be of two types. First, there can be practices, usages, and doctrines that inform the code and are implied by the code without being reduced to writing. In principle this is what occurs in every situation of judicial interpretation, as such usages and doctrines provide the normative link that enable judges to mediate between competing litigation narratives and codal text to arrive at judicial holdings. Second, there are also general principles of law, supereminent principles upon which the code rests or which it implies. For example, prior to the CCQ, there was the notion of patrimony as an unstated principle. When a court discovers or announces such a principle, it is either creating new law, describing law outside the code, or bringing to consciousness law that is within the code but not textually expressed. In the end, this is the most implicit form of non-textual codal amendment.¹⁰⁰

⁹⁹ As an example of the legislature opening the way for a third person to effect a non-textual modification of the code, consider the following. In order to maximize the opportunity for debtors to reinstate hypothecary security in default, the legislature amended article 2762, which specified what payment was required to effect such a reinstatement. The amended article provided that the "costs" to be reimbursed as a precondition were only those costs listed in the judicial tariff of costs. This amendment not only changed the meaning of costs in article 2762 (a procedural amendment) the statute also amended, unnecessarily, article 2667, which specified which costs could be secured by the initial hypothec (a substantive amendment). By doing so, the scope of the guarantee secured by a hypothec was also changed, and consequently the manner in which security for law costs may be claimed was changed. Previously, few creditors relied on their right to assert a prior claim for law costs (article 2651, clause 1), but now changing creditor practices at the moment of collocation of claims have produced a change in the normative content of article 2651, which has remained textually unchanged.

¹⁰⁰ Even absent textual recognition of these principles in a preliminary disposition, they form an integral part of a civil code's substance. On the potential problems raised by recourse to

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When representatives of the Quebec Bar presented their brief to the *Commission permanente des institutions*, they were primarily making a claim about the manner in which the direct legislative reform of the Code should be managed.¹⁰¹ Implicitly, the Bar argued that by enacting ad hoc amendments, the legislature demonstrated its institutional incapacity with respect to codal amendment. By implication, the Bar revealed the need for a body, such as the proposed Quebec Law Reform Institute, that can appreciate the internal logic and overarching rationales for a code.¹⁰² The Bar therefore focused on improving the legislative process as if this would be sufficiently responsive to the full range of normative issues to which codal change gives rise.

The gravamen of this section is that codal amendment occurs in multiple registers, multiple forms, and multiple processes. The sources of a code's normativity extend beyond the explicit text and direct legislative action. They are as various as are the agents engaged in the interactional narrative that determines the code's content—whether these agents be courts, officials, lawyers, or even legal subjects whose practices within the codal framework modify the substantive content of law.

In light of this analysis, one might ask: Is the legislative process sufficient to address issues of continuity and change in codal reform? Is it sufficient to guide law reform that works in practice and in theory both where the normative regime in question attaches to the state and

such principles in the constitutional context, see Jean Leclair, "Canada's Unfathomable Unwritten Constitutional Principles" (2001-2002) 27 Queen's L.J. 389. For a tentative affirmation of their use, on pluralist grounds, see Jean-François Gaudreault-DesBiens, "The Canadian Federal Experiment, or Legalism Without Federalism? Toward a Legal Theory of Federalism" in Manuel Calvo-García & William L.F. Felstiner, eds., *Federalismo/Federalism* (Madrid: Dykinson, 2004) 81 at 127-28.

¹⁰¹ See *supra* note 57. In particular, the Bar complained that sometimes the legislature failed to address major problems that it had signaled over time, and that on other occasions the legislature moved immediately to address problems caused to the government by judicial interpretation (article 2654.1 responding to *Chateau d'Amos*, *supra* note 74) or the discrete problems of a powerful lobby (for example, the proposed amendment to article 1726 altering the responsibility of a vendor of an immovable for latent defects).

¹⁰² For reflection on the capacity of legislatures to weigh the occasions when explicit rather than inexplicit law reform should be pursued, see Jean Beetz, "Reflections on Continuity and Change in Law Reform" (1972) 22 U.T.L.J. 129.

where it does not? And finally, would the creation of an official law reform body necessarily be sufficient to address issues of implicit law reform, absent a commitment to adopting an interactional pluralist methodology and agenda? These questions will be discussed in the next section.

C. *Tacit Law Reform*

In the previous sections of Part III, we have sought to show that, if seen through the lens of purely instrumental purposes, the day-to-day law reform activity of the National Assembly of Quebec reflects the dominant theory of law reform's paradigmatic practice: the haphazard application of legislative correctives meant to achieve an instrumental purpose.

All these discrete legislative interventions presuppose an internal exercise of reform that takes the basic assumptions of law as a given—as the foundation in which the reforming endeavour will be rooted. But not all law reform is of this character. Patterns of legislative law reform in the former socialist republics of central Europe involve all the practices just reviewed with an additional dimension. There, the rush to reform has not led to indigenous reflection about the background conditions necessary for successful implementation of reform measures,¹⁰³ but to a continuing series of exogenous transplants.¹⁰⁴

¹⁰³ This may be perhaps impossible where an economic and political system is also undergoing transformation. See for the importance of this kind of contextual sensitivity, David Berkowitz, Katharina Pistor & Jean-Francois Richard, "The Transplant Effect," (2003) 51 Am. J. Comp. L. 163, and David Berkowitz, Katharina Pistor & Jean-Francois Richard, "Economic Development, Legality, and the Transplant Effect" (2003) 47 Eur. Econ. Rev. 165. Arthurs has addressed a similar set of questions in his ongoing critique of Canadian responses to the New Economy. See e.g. "Globalization of the Mind: Canadian Elites and the Restructuring of Legal Fields" (1997) 12:2 C.J.L.S. 219; "Poor Canadian Legal Education: So Near to Wall Street, So Far From God" (2000) 38 Osgoode Hall L.J. 381; "'Mechanical Arts and Merchandise': Canadian Public Administration in the New Economy" (1997) 42 McGill L.J. 29; and "Labour Law Without the State" (1996) 46 U.T.L.J. 1.

¹⁰⁴ See generally Miller, *supra* note 14. For a detailed empirical investigation of how one type of ideological, textual transplant—the rule of law—has failed more often than succeeded, see Erik Jensen & Thomas Heller, eds., *Beyond Common Knowledge: Empirical Approaches to the Rule of Law* (Stanford: Stanford University Press, 2003). Of course, consideration of these background conditions is also important when law reform takes place within a single national legal order. Typically, reformers are cognizant of them when a perceived crisis arises, but absent these circumstances, national reformers can be unthinkingly accepting of the background socio-

While these transplanted statutory regimes appear, at least at first, to work in practice, they typically soon create confusion elsewhere in the legal system. There are few better examples of normative incoherence than those that result from attempts to export Article 9 of the Uniform Commercial Code (UCC) around the world. There are just a limited number of core legal principles that should inform the law of secured transactions in a market or quasi-market economy. Yet in both common and civil law countries, to make fully operational any legislation that results from their adoption, it is necessary to attend to the "on the ground" contexts within which transplanted legislation is meant to operate.¹⁰⁵ Inevitably, explicit law reform will generate collateral changes not just to other legislative texts and to judicial interpretations throughout the system, but also to the practices of everyday law among legal subjects. We call this kind of subliminal, ripple-effect legal change, *tacit law reform*.

Many factors besides the general structure of the legal regime comprise the overall context of commercial (and by implication all other) law reform.¹⁰⁶ States can have quite distinct socio-economic-political systems. In addition, the types and actual role of credit institutions and the contractual practices found in commercial law generally vary considerably among states. For this reason, it is important to be clear about the various features and conditions that are presupposed by existing regimes of secured lending so that the policy goals sought to be achieved through these principles can be realized in practice. The central lessons learned from attempts at modernization and transplantation of commercial law regimes may be summarized in nine main themes of general application.¹⁰⁷ Before briefly reviewing

economic-political status quo. See Robert E. Scott, "The Politics of Article 9" (1994) 80 Va. L. Rev. 1783.

¹⁰⁵ A detailed discussion of a failed attempt at modernization by transplantation inattentive to local social, economic, and political conditions is presented in Macdonald, *Ukraine, supra* note 62. The practices and pitfalls of commercial law reform in non-common law jurisdictions are discussed in Roderick A. Macdonald, "Article 9 Norm Entrepreneurship" Can. Bus. L.J. [forthcoming in 2006].

¹⁰⁶ Once again, Arthurs' views on this issue track our own. See "Cultures and Legal Systems: A Canadian Perspective" in R. Blanpain, ed., *Law in Motion* (The Hague: Kluwer International, 1997) 47.

¹⁰⁷ It is not just in post-socialist regimes and it is not just in respect of commercial law reform that these central lessons are applicable. All countries in transition to market economies confront such challenges. Much of the section that follows is adapted from Roderick A. Macdonald,

these themes, we would like to observe that they nicely illustrate both the interactional and pluralistic foundations of successful law reform, as well as the necessity of locating what appears to be simply pragmatic and instrumental law reform within a broader theoretical framework.

First, no subject-matter in law comprises a free-standing field of legal regulation that exists outside economic practices. For example, as a sub-set of debtor-creditor law, the law of secured transactions must be adapted to general practices of credit-granting in a jurisdiction. A legal regime that presupposes open competition for credit, relatively easy sources of enterprise refinancing, and social practices that do not relieve a debtor from paying debts simply because it is in economic distress, needs to be adjusted for countries where a small number of institutions (sometimes the national bank owned by the state) have a de facto or de jure credit monopoly or oligopoly.

Second, notwithstanding general themes within legal traditions, each state tends to develop a distinctive legal architecture. Not every legal system deals with security devices within a single discrete statute that carries the label “secured transactions.” Some states attach the regime to an existing civil code, or enact separate commercial codes applied by separate commercial courts. Finally, while some jurisdictions deal with problems of business borrowing in corporations statutes, others may deal with them in securities legislation or in the bankruptcy statute.

More than this, as a third point, any legislative transplant must respect the fundamental concepts of private law within a jurisdiction. This is especially true of basic principles of obligations and property. For example, it is not possible to implant legal regimes based on common law principles (and in particular, the conceptual structure of secured transactions under Article 9 of the UCC that rests on a “substance of the transaction” principle) into a civil law country that maintains a sharp conceptual distinction between owning and owing.

Fourth, as well-drafted and elegant their phraseology and conceptual apparatus might be, substantive legal regimes must take into account the manner in which the infrastructure of civil procedure actually works. A secured transactions regime that assumes fast and

“Considerations Relating to a Chapter on Implementation” in *Legislative Guide on Security Interests* (UNCITRAL) [forthcoming in 2007].

efficient public enforcement mechanisms will not work where it can take three to four years to obtain a civil judgement and after that another year to obtain enforcement. Moreover, if there are neither interim and interlocutory orders nor a functioning sheriff's department, it is risky to assign discretionary self-help rights to creditors or debtors. Without the ultimate sanction of an expeditious judicial recourse, all such self-help rights are open to abuse by the party in actual possession of the collateral.

Fifth, specific regulatory regimes will always be situated within a broader functional context. Secured transactions law is closely connected to legislative regimes that facilitate the collective regulation of debtor and creditor relationships—that is, bankruptcy and insolvency and corporation liquidation. If a state provides for special liquidation regimes outside the framework of the general insolvency and corporate winding-up legislation applicable to, say, banks and state corporations, a secured transactions regime has to be designed with these other regimes in view as well.

Sixth, ideas that can be successful in certain types of legal systems, with certain assumptions about how debtors and creditors actually deal with legal principles, can fail to take root in other legal systems. For example, if there is a popular belief that it is appropriate to invent proof and assertions of facts after an event has occurred, it would be unwise in a secured transactions regime to rely on possession as a mode of third-party "publicity" for secured rights. Deciding which principles of publicity and enforcement can actually be made to work in a given jurisdiction presupposes a keen sense of how these principles are likely to play out in practice.

Seventh, no law reform can be successful if the conditions necessary for the rule of law as known in states like Canada are absent. If the ideas of an independent, impartial judiciary, or an incorruptible registry, sheriff's office, and state execution service do not form part of the constitutional order, the enforcement regime for security would have to be designed to accommodate other modes of enforcement and dispute settlement such as independent commercial arbitrations. Again, if one of the legal professions such as the notarial profession has traditionally had an important role in commercial affairs in a jurisdiction, designing the regime so as to draw on the expertise and status of that profession will contribute to its taking root. Conversely, if the profession of advocate is completely unregulated, a regime that

delegates significant ethical responsibility to lawyers may be sub-optimal.

Eighth, a secured transactions regime must be sensitive to the state of capital markets, the nature of entrepreneurship, and the general diffusion of legal knowledge within a given state. If there are simply not enough lawyers to provide advice to clients who wish to borrow or lend, the regime will have to be designed so it can be operated by those who may not have formal legal training. Again, if the general ethic of capitalist entrepreneurship has decidedly rapacious if not corrupt and thuggish undertones, providing a surfeit of creditors' rights may actually militate against achieving an efficient secured transactions regime. The success of a secured transactions regime typically rests on there being a broad culture of entrepreneurial capitalism, and on lenders and borrowers exercising self-discipline in extending and enforcing credit.

In some ways, the most important lesson is the ninth: a secured transactions regime must respect the political culture of the country in question. For example, the widespread use of *private* social insurance programmes in North America means that a secured transactions regime can be designed to favour lenders to the exclusion of the state (or its agencies). Yet one cannot assume that all states locate regimes providing basic social programmes on the same side of the public-private divide. If a state has a plethora of public social insurance schemes, it may be that it can only keep these programmes solvent by providing them with a priority entitlement in bankruptcy that tracks the priority obtained by private insurers through contractual security rights.¹⁰⁸

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Ensuring that a transplanted regime of legal regulation is harmonized with the general structure of socio-economic, political, and legal relations that exist in the enacting country is only a first step towards successful law reform. One must attend to the internal structures of legal

¹⁰⁸ The point is particularly appropriate for fields of economic regulation. Jurists who wish to see new secured transactions law reflect current developments in the developed commercial jurisdictions, such as the United States, must appreciate that the version of article 9 now being promulgated is the third version of that article and that borrowers and lenders in the United States have had more than forty years to refine the logic of the regime it reflects.

regulation and undertake a detailed examination of values, processes, methods, and techniques of the law as they are manifest in particular states. This involves both general questions of systemic integration of the new legislation, and general principles for drafting commercial law statutes. Here then is the true import of tacit law reform: assumptions about the socio-economic and political conditions may typically lie unvoiced in the background of law reform efforts, but they inevitably become heard as they interact with the explicitly expressed features of a given legal order and the everyday law of citizens. Tacit law reform entails expressly acknowledging these conditions, and recognizing the ways in which reform measures may shape and be shaped by them.

Each of these considerations tracks, in the realm of exogenous law reform, the tacit considerations that inform the ordinary practices of indigenous law reform. Not surprisingly, each suggests that interactional, pluralistic law reform is the only type of law reform likely to be successful—simply because law itself is interactional and pluralistic.¹⁰⁹ In other words, these reflections on the tacit dimensions of all law reform reveal, more clearly and more poignantly than exchanges between a bar association and a legislature, how important theory is to successful law reform. Any theory of practice that does not attend to both instrumental and symbolic concerns, to law as a regulative ideal and constitutive practice, does not provide or facilitate an interactive narrative of legal pluralistic agents. Rather, it reflects a top-down activity imposed by the state and as such, is a recipe for failure.

IV. CONCLUSION: RE-FORM OR RE-SUBSTANCE? TRANSFORMATION AND TRANS-SUBSTANTIATION

This article has sought to investigate contemporary conceptions of law reform. Its ostensible theme is the relationship between theory and practice, although in structure it is meant to suggest various ways of conceiving both theory and practice. Theoretically, the article contrasts standard accounts of everyday instrumental law and law reform with an alternative model characterized as interactional and pluralistic. In the

¹⁰⁹ In this light, we reject both standard formalist accounts of law reform through legal transplants, and the hyper-skeptical “no transplant is possible” accounts of commentators like Pierre Legrand. See “What ‘Legal Transplants’?” in Nelken & Feest, *supra* note 14, 55. Our position resembles that advanced by Roger Cotterrell in “Is There a Logic of Legal Transplants?” (*ibid.*, 70 at 71).

realm of practice the article has sought to show how complex an endeavour law reform is—embracing everything from explicit, textual, legislative reform, to implicit, non-textual, informal, even tacit, law reform. The approach taken along both of these dimensions recalls the work of Arthurs: it is informalist, pluralistic, grounded in experience, non-hierarchical, and aspirational.

The two substantive sections raise complementary perspectives on the fundamental question: to whom does law belong, and to whom does its reform belong?¹¹⁰ In large measure, the successful practice of law reform depends on having a theory of legal acculturation. The success of any law reform project depends on its engaging with and being understood by those to whom it is intended to speak. This means not just politicians, the legal profession, and the principal lobby groups that can influence politicians; it means, above all, the public.¹¹¹

But the need for engagement and understanding does not end at the moment legislation is enacted. To say that a law reform initiative is successful is to make a claim about its effectivity as a regulatory endeavour. Success implies that, first, the regime is deployed in practice—that is, it actually manages to capture the imagination of lawyers and legal subjects as an efficient, effective, and fair means of structuring their affairs. Success implies, secondly, that the regime is properly understood and interpreted by all those who are called upon to put it into action—lawyers, entrepreneurs, bailiffs, sheriffs, registrars, and, above all, judges. Producing the necessary acculturation does not result from happenstance. It requires a concerted effort in multiple dimensions, and a national or transnational law reform institute may play a decisive role in managing this effort.¹¹²

As soon as a new law comes into force, lawyers and their clients, public officials, and judges are required to interpret and apply its terms.

¹¹⁰ See Roderick A. Macdonald, "In Search of Law" (Orientation document prepared for the Law Commission of Canada, 4 October 1998, formerly on Law Commission of Canada website, but now unpublished) for a discussion of law reform that does not presume the centrality of those with formal legal training.

¹¹¹ Consider the pertinence of Arthurs' view on the matter as expressed in "Counsel, Clients and Community" (1973) 11 Osgoode Hall L.J. 437.

¹¹² See the discussion in Y. Dezalay & B. Garth, "The Import and Export of Law and Legal Institutions: International Strategies in National Palace Wars," in Nelken & Feest, *supra* note 14, 241. On the problem of international law reform that is inattentive to such considerations, see Jensen & Heller, *supra* note 104.

To achieve this in a manner coherent with an interactional, pluralist perspective requires concerted effort to produce written materials, seminars, and conferences to resituate the law within everyday practices and understandings. It also requires official commentaries prepared by the sponsoring ministry together with doctrinal commentaries, especially those that take divergent perspectives. The commentaries should attempt to explain the law, relate it to previous regimes, suggest where existing rules have been explicitly or implicitly overruled or carried forward, and indicate how affairs may be structured under the new law so as to complement, and even encourage, individual initiative. And again, standard form documents—forms and precedents—as well as well-indexed law reporting are important to ensure that the learning of the new law quickly percolates. Successful acculturation demands investment in informational clearinghouses (preferably on-line) to ensure that the informational base in relation to the reformed legislation is up-to-date and sophisticated.

The point of law reform is to produce a regime that will work, not just in practice but also in theory; not just instrumentally, but also symbolically. Successful implementation means attending to these historical, cultural, institutional, and technical issues. It does not mean simply drafting the perfect set of regulatory rules to achieve a change in legal form, or what may be a literal “re-form” of the law. It means drafting to re-substance the law. And this, in turn, means imagining how transforming a hierarchical, formalized, and instrumental conception of law and legal subjectivity into an interactive, implicit, and pluralistic understanding of institutions, constitutive rules, and human agency will effect a transubstantiation of the law itself.

This conclusion recalls, in inverted form, a phrase that one of us first heard from Arthurs more than thirty years ago: the idea that is good in practice but bad in theory, is bad in practice.